IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. [redacted] 2

LOVANDER LADNER,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the District Court appears at pages 13 *et seq.* of the Record. The opinion of the Court of Appeals, as amended (R. 21), is found at pages 17 *et seq.* of the Record and is reported at 230 F. (2d) 726.

Jurisdiction

This proceeding originated with a motion to correct the sentence imposed upon petitioner (R. 11), made on January

22, 1955, pursuant to 28 U. S. C. § 2255. The order of the District Court denying the motion, filed on February 26, 1955 (R. 14), was affirmed by the judgment of the Court of Appeals entered on February 29, 1956 (R. 22). On May 10, 1956, Mr. Justice Black extended the time for filing a petition for certiorari to and including June 28, 1956 (R. 23). The petition was filed on June 21, 1956, and was granted on November 13, 1956 (R. 23). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). See *United States* v. *Hayman*, 342 U. S. 205, 209, note 2 (1952).

Question Presented

1. Whether the single discharge of a deadly or dangerous weapon, which resulted in the wounding of two Federal agents while engaged in the performance of their official duties, constituted two distinct violations of Section 254 of former Title 18 of the U. S. Code (1940 ed.) for which two maximum sentences of imprisonment, running consecutively, could be imposed.[1]

Statutory Provisions Involved

1. Petitioner's motion to correct his sentence was made pursuant to Section 2255 of Title 28, U. S. C., which provides as follows:

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[1] In its brief in opposition to the petition for certiorari, the Government urged that petitioner would not be entitled to a hearing before the district court under Section 2255 unless it should appear from the face of the indictment that no Federal offense could possibly have been committed. Cited in support of this contention were *Goto* v. *Lane*, 265 U. S. 393 (1924) and *Sunal* v. *Large*, 332 U. S. 174 (1947), both of which held that a petition for a writ of habeas corpus could not be used as a substitute for an appeal. In the light of the explicit language and the purposes of Section 2255, the Government's point is frivolous and will not be argued in this brief (R. 20). *United States* v. *Hayman*, *supra*, 342 U. S. 205 (1952).

"§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

2. Petitioner was indicted under Section 254 of former Title 18, U. S. C. (1940 ed.), which provided at all material times:

"§ 254. Resisting, interfering with, or assaulting Federal officer; penalty.

"Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person designated in section 253 of this title while engaged in the performance of his official duties, or shall assault him on account of the performance of his official duties, shall be fined not more than $5,000, or imprisoned not more than three years, or both; and whoever, in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both."

3. Section 253 of former Title 18, U. S. C. (1940 ed.), referred to in said section 254, provided at all material times:

"§ 253. Killing Federal officer; penalty.

"Whoever shall kill, as defined in sections 452 and 453 of this title, any United States marshal or deputy

United States marshal or person employed to assist a United States marshal or deputy United States marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, post-office inspector, Secret Service operative, any officer or enlisted man of the Coast Guard, any employee of any United States penal or correctional institution, any officer, employee, agent, or other person in the service of the customs or of the internal revenue, any immigrant inspector or any immigration patrol inspector, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Division of Grazing of the Department of the Interior, or any officer or employee of the Indian field service of the United States, while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under section 454 of this title."

Statement of the Case

Petitioner and one Cameron were jointly indicted under a three-count indictment on June 13, 1944 in the United States District Court for the Southern District of Mississippi, Southern Division (R. 1). The first count charged that petitioner and Cameron, on or about May 22, 1944, conspired, by means and use of deadly and dangerous weapons, to commit an assault on "Agents of the Alcohol Tax Unit of the Internal Revenue Service of the Treasury Department of the United States, on account of the per-

formance of their official duties, and while such officers were then and there engaged in the performance of their official duties" (R. 1); the second count charged that petitioner and Cameron, on or about May 22, 1944, "by means and use of deadly and dangerous weapons, to wit: loaded shotguns" did "forcibly assault" one Reed, an "Agent of the Alcohol Tax Unit * * *, on account of * * * and while * * * engaged in the performance of his official duties", and "shot and seriously wounded the said * * * Reed" (R. 3, 4); and the third count charged that petitioner and said Cameron committed a similar assault at the same time and place upon another agent of the Alcohol Tax Unit, one Frost, and "shot and wounded" the said Frost (R. 4, 5).

On June 23, 1944, petitioner and Cameron were arraigned and pleaded not guilty to the indictment; upon the same day they were tried by a jury before United States District Judge Sidney C. Mize, and were found guilty as charged in the indictment (R. 10). No transcript of the testimony was taken (R. 13). On the same day petitioner was sentenced to imprisonment for two years on the first count of the indictment, said sentence to run concurrently with the sentence on the second count; to imprisonment for ten years on the second count; and to imprisonment for ten years on the third count, said sentence to begin to run upon the expiration of the sentences on the first two counts (R. 11). Thus petitioner was sentenced to twenty years imprisonment (R. 11). No appeal was taken from the judgment of conviction or the sentence of the District Court (R. 13).

On January 22, 1955, petitioner filed a motion *pro se* to correct the sentence imposed upon him by making the sentence under the third count of the indictment run concurrently with the sentences under the second and first counts (R. 11, 12). The motion alleged that the second and third

counts charge a single offense[2] (R. 11). Pursuant to the provisions of 28 U. S. C. § 2255, the motion was filed in the court which had imposed the sentence, and was considered by District Judge Mize.

This motion was denied by an order entered on February 26, 1955 (R. 14). In an opinion filed on February 23, 1955, Judge Mize stated that "the court recalls that the testimony showed that more than one shot was fired into the car in which the officers were riding with a prisoner they had arrested" (R. 13). He conceded, however, that no transcript of the testimony at the trial had been made and that no bill of exceptions had been taken to any of the original proceedings (R. 13). Making an obvious error of identity, Judge Mize stated, both in his opinion and in a letter to petitioner, that petitioner had previously made a similar motion, and cited in his opinion, in support of such statement, his decision denying such a motion made by petitioner's co-defendant, Cameron[3] (R. 12-14, 19).

Petitioner was granted leave to appeal *in forma pauperis* from Judge Mize's order to the Court of Appeals for the Fifth Circuit (R. 15, 16). The United States Attorney designated as part of the record on appeal a sworn statement of one Ares J. Hoda in which Hoda stated, among

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[2] The motion does not specifically allege that there was only a single discharge of a gun by petitioner or his co-defendant; but such a claim is implicit in the brief of petitioner in support of his motion. In any event the matter has proceeded on the assumption that petitioner claims that "one shot and no more was fired" (R. 18, 13).

We do not mean to concede that, if two or more shots were fired in rapid succession in a single transaction, each shot would constitute a separate offense under the statute. See Horack, The Multiple Consequences of a Single Criminal Act, 21 Minn. L. Rev. 805, 807 (1937). However, that question is not before the Court and will not be argued in this brief.

[3] Judge Mize was also confused about the indictment, referring to the charge of the first count as "conspiracy to kill two ATU agents" (R. 13). This is, of course, contrary to the fact (R. 1).

other things, that he heard five shots fired at a place where he had seen petitioner and Cameron a few minutes before, but that the shots were fired when he was at least a half mile from that place (R. 5, 8). Except for this document, which is obnoxious to our concepts of a fair criminal proceeding, the record is devoid of any evidentiary matter.

The Court of Appeals rejected the statement of Hoda as having no probative value, and disregarded the personal recollection of Judge Mize concerning the number of shots fired (R. 18, 19). Moreover, the Court stated that if a single discharge of a shotgun, which resulted in the wounding of two Federal officers, could constitute but a single violation of the statute, petitioner would have been entitled to a hearing on his motion to determine whether the evidence at the trial showed that the gun was only fired once (R. 20). But the Court of Appeals held that petitioner was guilty of a separate assault upon each of the officers who were wounded without regard to the number of shots fired, and upon this ground affirmed the order denying petitioner's motion (R. 21, 22).

The opinion of the Court of Appeals was filed on February 29, 1956 (R. 17). That opinion was amended by the Court on April 4, 1956, apparently after the case of *Bell* v. *United States*, 349 U. S. 81 (1955) had come to its attention (R. 21).

On June 21, 1956, petitioner filed in this Court his petition for a writ of certiorari and a motion for leave to proceed *in forma pauperis*. Both the motion and the petition were granted on November 13, 1956 (R. 23). 352 U. S. 907. On January 14, 1957, this Court appointed petitioner's present counsel to serve as counsel in the case. 352 U. S. 959.

Petitioner was released on parole from the United States Penitentiary, Atlanta, Georgia, on August 30, 1956, and

will remain under supervision until the expiration of his sentence.[4]

Summary of Argument

This case calls for the determination of the "unit of prosecution" under Section 254 of former Title 18, U. S. C. (1940 ed.) or, more precisely, under the second clause of that Section.

The Court of Appeals held that Section 254 denounced the offense of assault with a dangerous weapon and that the number of persons assaulted, even by a single blow, measured the number of violations of the statute in this case. However, a careful reading of the language of Section 254 is sufficient to show that the offense proscribed by the second clause is the use of a deadly or dangerous weapon for a number of forbidden purposes, and that, accordingly, the unit of prosecution is such use. It follows that, if only one shot was fired in this case, there was only one offense, and this would be true whether several officers were struck by the shot, or, indeed, none was struck. This construction of the statute, derived from its own terms, is supported by the legislative history of Section 254 and of Section 111 of present Title 18, which stems in part from Section 254.

Determination of the unit of prosecution under a Federal criminal statute involves a careful inquiry into the intention of Congress in enacting the particular statute. Although decisions under other statutes cannot reveal that

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[4] It is clear that the release of petitioner from confinement does not make the case moot, in view of his continuing obligations as a parolee and his liability to being returned to prison if he should violate his parole agreement. Cases where the effects of a decision would be much less substantial have been held not to be moot. See *Fiswick* v. *United States*, 329 U. S. 211, 220-223 (1946); *United States* v. *Morgan*, 346 U. S. 502, 512-513 (1954).

intention in respect of Section 254, several groups of cases arising under other statutes support the foregoing interpretation of the statute here involved.

This case and its companion cases involve critically important questions in the administration of criminal justice in the Federal courts. Those questions relate to the permissibility of the finding of multiple offenses, and of multiple trials and punishments, predicated upon a single criminal act or transaction. Recent decisions of this Court have affirmed the doctrine that multiplication of such offenses, trials and punishments involves penalties and other hardships so severe that it will be sanctioned only when clearly authorized by Congress. In one of those decisions this Court has abandoned the artificial rule of thumb, known as the "same evidence" rule, for determining whether one or more offenses have been committed. Since there is no clear expression of the intention of Congress authorizing multiple sentences for a single act in violation of Section 254, the decision below is erroneous and should be reversed.

ARGUMENT

I

The Offense Proscribed Under the Second Clause of Section 254 of Former Title 18, U. S. Code Is Defined in the Statute as the Use of a Deadly or Dangerous Weapon for Any of the Forbidden Purposes.

The first clause of Section 254 of former Title 18, U. S. C, imposed a fine not more than $5,000 or imprisonment for not more than three years, or both, upon any person who "shall forcibly resist, oppose, impede, intimidate, or interfere with any person designated in Section 253 of this title while engaged in the performance of his official duties, or

shall assault him on account of his official duties." Under the second clause a fine not more than $10,000 or imprisonment for not more than ten years, or both, were imposed upon anyone who "in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon."

It is clear from the words of the statute that the use of a deadly or dangerous weapon was condemned by the second clause, and that the consequences of such use are not relevant in determining whether the statute has been violated or whether more than one violation has occurred. Thus, if petitioner had fired a shotgun in the air, or merely brandished it as a club, in opposing, impeding or intimidating the two Federal officers who were here involved, he would have been guilty under the second clause. But in that case the number of Federal officers who were impeded or intimidated would surely not have measured the number of violations of the second clause. *Cf*: *Lockhart* v. *United States,* 136 F. (2d) 122 (C. A. 6th, 1943); *Dimenza* v. *Johnston,* 130 F. (2d) 465 (C. A. 9th, 1942). In the same way the single discharge of a shotgun at several Federal officers could constitute only a single violation of the second clause, and this would be true whether two or six of such officers were struck by the shot, or the shot missed the mark completely.

This case has proceeded upon the assumption that the offense here involved was an assault and battery upon Federal officers by means of a deadly weapon. Thus, the second count of the indictment alleges that petitioner and Cameron "shot and seriously wounded" Agent Reed (R. 4), and the third count alleges that petitioner and Cameron "shot and wounded" Agent Frost (R. 5). These allegations are clearly surplusage, but obfuscated the issue of the precise offense that was charged. The judgment on the

verdict of the trial court referred to the conviction under the second and third counts with the phrase "forcibly assault said officers," which is substantially the language of the first clause of the statute, and made no reference to the use of a deadly or dangerous weapon, the gravamen of the offense proscribed by the second clause (R. 10, 11). In his opinion on petitioner's motion to change the sentence, Judge Mize referred to the two clauses of Section 254, relied heavily upon the word "any" in each clause, and concluded that the statute "very clearly makes an assault upon each officer a separate crime" (R. 14). The Court of Appeals, in its amended opinion, held that petitioner was "guilty of a separate assault upon each of the two officers who were wounded by his gun fire * * * " (R. 21). Both of the lower courts virtually ignored the dichotomy of the statute, under which the use of a deadly weapon for any of a number of purposes is made an offense, and the offense is completed when the weapon is used regardless of the consequences.

An example of a statute which prohibits assault with a dangerous weapon may be found in Article 128(b) of the Uniform Code of Military Justice, Act of August 10, 1956, c. 1041, § 928, 70A Stat. 75 (10 U. S. C. § 928), which provides:

"(b) Any person subject to this chapter who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct."

In subsection (b)(2) Congress has made an assault and the intentional infliction of bodily harm an offense, and it is clear that such infliction of injury is an essential element of a violation of that provision. Quite different is Section 254, which is silent concerning the consequences of the forbidden act.

Where a statute, such as the above subsection (b)(1) of Article 128 of the Military Code, simply prohibits assault with a dangerous weapon, it may be necessary to seek extraneous aid to determine whether the striking of two persons *uno ictu* constitutes one or two assaults under the statute. But under the proper construction of Section 254, there is no such need. For under the second clause of that Section the offense is clearly defined as the use of a deadly or dangerous weapon.

II

The Legislative History of Section 254 Supports the Construction of the Statute Derived from Its Own Terms.

Section 254 of former Title 18 found its origin in Section 2 of "An Act To provide punishment for killing or assaulting Federal officers", approved May 18, 1934, 48 Stat. c. 299, p. 780. The first section of that statute condemned the killing of certain Federal officers, and, with immaterial amendments, became Section 253 of former Title 18.

The Act of May 18, 1934, originated in the Senate as S. 2080 in the 73rd Congress, 2d Session. This bill was introduced into Congress at the request of the Department of Justice. In virtually identical letters, addressed to the respective chairmen of the Senate and House Committees on the Judiciary by Attorney General Homer Cummings,

the purposes of, and need for, the legislation were set forth.[5]

In these letters the Attorney General urged the Congress to adopt general legislation for the protection of Federal

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[5] The letter to Senator Ashurst, Chairman of the Senate Committee on the Judiciary, is as follows:

"Department of Justice,
January 3, 1934.

"Hon. Henry F. Ashurst,
Chairman, Committee on the Judiciary,
United States Senate,
Washington, D. C.

My dear Senator:

"I wish again to renew the recommendation of this Department that legislation be enacted making it a Federal offense forcibly to resist, impede, or interfere with, or to assault or kill, any official or employee of the United States while engaged in, or on account of, the performance of his official duties. Congress has already made it a Federal offense to assault, resist, etc., officers or employees of the Bureau of Animal Industry of the Department of Agriculture while engaged in or on account of the execution of their duties (sec. 62, C. C.; sec. 118, title 18, U. S. C.); to assault, resist, etc., officers and others of the Customs and Internal Revenue, while engaged in the execution of their duties (sec. 65, C. C.; sec. 121, title 18, U. S. C.); to assault, resist, beat, wound, etc., any officer of the United States, or other person duly authorized, while serving or attempting to serve the process of any court of the United States (sec. 140, C. C.; sec. 245, title 18, U. S. C.); and to assault, resist, etc., immigration officials or employees while engaged in the performance of their duties (sec. 16, Immigration Act of Feb. 5, 1917, c. 29, 39 Stat. 885; sec. 152, title 8, U. S. C.). Three of the statutes just cited impose an increased penalty when a deadly or dangerous weapon is used in resisting the officer or employee.

"The need for general legislation of the same character, for the protection of Federal officers and employees other than those specifically embraced in the statutes above cited, becomes increasingly apparent every day. The Federal Government should not be compelled to rely upon the courts of the States, however respectable and well disposed, for the protection of its investigative and law-enforcement personnel; and Congress has recognized this fact at least to the extent indicated by the special acts above cited. This Department has found need for similar legislation for the adequate protection of the special agents of its division of investigation, several of whom have

officers and employees other than those covered by certain specific statutes referred to by the Attorney General.

Among the specific statutes referred to by the Attorney General was Section 140 of the Criminal Code, which, in the language of the Attorney General, made it an offense "to assault, resist, beat, wound, etc., any officer of the United States, or other person duly authorized, while serving or attempting to serve the process of any court of the

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been assaulted in the course of a year, while in the performance of their official duties.

"In these cases resort must usually be had to the local police court, which affords but little relief to us, under the circumstances, in our effort to further the legitimate purposes of the Federal Government. It would seem to be preferable, however, instead of further extending the piecemeal legislation now on the statute books, to enact a broad general statute to embrace all proper cases, both within and outside the scope of existing legislation. Other cases in point are assaults on letter carriers, to cover which the Post Office Department has for several years past sought legislation; and the serious wounding, a couple of years ago, of the warden of the Federal Penitentiary at Leavenworth by escaped convicts outside the Federal jurisdiction. In the latter case it was possible to punish the escaped convicts under Federal law for their escape; but they could not be punished under any Federal law for the shooting of the warden.

"I have the honor, therefore, to enclose a copy of S. 3184, which was introduced at the request of this Department in the 72d Congress and to urge its reintroduction in the present Congress, and to express the hope that it may receive prompt and serious consideration of your Committee.

Respectfully,
Homer Cummings,
Attorney General"

S. R. No. 535, 73rd Cong., 2d Sess. (March 20, 1934).

The letter to Congressman Hatton W. Summers, Chairman of the House Committee on the Judiciary, is identical with the letter to Senator Ashurst except for the last paragraph. That paragraph, substituted for the last paragraph of the Ashurst letter, refers to H. R. 10588 and states that that bill had been introduced in the 72d Congress by Congressman Summers at the request of the Department of Justice.

H. R. No. 1455, 73rd Cong., 2d Sess. (May 3, 1934).

United States." Furthermore, in discussing the need for the proposed legislation, the Attorney General referred to an incident in which the warden of the Federal Penitentiary at Leavenworth had been seriously wounded by escaped convicts. It is clear, therefore, that the attention of Congress was directed to the possibility of punishing wounding as a specific offense. Nevertheless, Section 254 does not mention such an offense.

There is little more in the legislative history of S. 2080 that casts any light on our problem. The report of the House Committee on the Judiciary contains the following statement:

> "The second paragraph imposes a penalty for forcibly resisting or interfering with any such Federal officer while engaged in the performance of his official duties, or for assaulting him on account of the performance of his official duties. If a dangerous weapon is used in the commission of any such offense the penalty is increased." H. R. No. 1455, 73rd Cong. 2d Sess., *supra.*

This statement merely paraphrases the statute and adds nothing to its meaning.

The progress of S. 2080 through Congress is not remarkable. Certain amendments, which have no direct bearing on our problem but which show that the bill was given careful consideration, were adopted by the House of Representatives. Subsequently, the bill went to conference, the House amendments were amended (H. R. No. 1593, 73rd Cong. 2d Sess.), and the bill was thereafter enacted into law.

It may be concluded that the legislative history of Section 254 shows that Congress, with the aid of the Department of Justice, intended to speak in the language of the statute and to say nothing more. In particular, Congress

refrained from taking cognizance of the effects of the acts proscribed in the statute, including the wounding of Federal officers.

III

The Legislative History of Section 111 of Title 18, U. S. Code Further Supports the Construction of Section 254 Derived from Its Own Terms.

Section 111 of Title 18, U. S. C. now provides:

> "§ *111. Assaulting, resisting, or impeding certain officers or employees*
>
> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Section 1114 of Title 18 makes it an offense to kill certain officers and employees of the United States, including "any officer, employee or agent * * * of the internal revenue." Accordingly, Section 111 would now apply to a case like the present case.

Section 111 was enacted as part of the revision of Title 18 by the Act of June 25, 1948, c. 645, 62 Stat. 683, 688. Section 1114 was enacted as part of said revision of Title 18 (62 Stat. 683, 756), and was amended in immaterial respects by the Act of May 24, 1949, c. 139, § 24, 63 Stat. 89, 93. Neither Section 111 nor Section 1114 was in effect when the offense of petitioner occurred.

The sources of Section 111 of Title 18 are stated by the Committee on the Judiciary of the House of Representatives in its report on the 1948 revision of Title 18 as follows:

"Based on title 18, U. S. C. 1940 ed. §§ 118, 254 (Mar. 4, 1909, ch. 321, § 62, 35 Stat. 1100; May 18, 1934, ch. 299, § 2, 48 Stat. 781).

"This section consolidates sections 118 and 254 with changes in phraseology and substance necessary to effect the consolidation.

"Also the words 'Bureau of Animal Industry of the Department of Agriculture' appearing in section 118 of title 18, U. S. C., 1940 ed., were inserted in enumeration of Federal officers and employees in section 1114 of this title.

"The punishment provision of section 254 of title 18, U. S. C., 1940 ed., was adopted as the latest expression of Congressional intent. Thus consolidation eliminates a serious incongruity in punishment and application."

H. R. No. 304, 80th Cong. 1st Sess., p. A 12 (April 24, 1947).

Section 118 of Title 18, prior to the 1948 codification, provided:

"§ 118. (Criminal Code, section 62.) Molesting Animal Industry employees; using deadly weapon.

"Whoever shall forcibly assault, resist, oppose, prevent, impede, or interfere with any officer or employee of the Bureau of Animal Industry of the Department of Agriculture in the execution of his duties, or on account of the execution of his duties, shall be fined not more than $1,000, or imprisoned not more than one year, or both; and whoever shall use any deadly or dangerous weapon in resisting any officer or employee of the Bureau of Animal Industry of the Department

of Agriculture in the execution of his duties, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duties, or on account of the performance of his duties, shall be fined not more than $1,000, or imprisoned not more than five years, or both." 18 U. S. C. § 118 (1940 ed.).

Under the consolidation of this statute of limited application with the more general but cognate statute, Section 254 of former Title 18, the inconsistency in the maximum imprisonment terms of the two statutes was resolved by adopting the three year and ten year penalties of Section 254, as the Committee report indicates. Expansion of the reach of the consolidated statute, Section 111 of present Title 18, to include employees of the Bureau of Animal Industry was achieved by the simple expedient of adding such employees to the list of Federal employees in Section 1114 of present Title 18.

Section 118 of former Title 18 was taken *ipsissimis verbis* from the Criminal Code of 1909. Act of March 4, 1909, c. 321, § 62, 35 Stat. 1088, 1100. The statute found its origin in the Act of March 3, 1905, c. 1496, 33 Stat. 1264. But the provision in the original statute, from which Section 118 was derived, reads as follows:

"Sec. 5. That every person who forcibly assaults, resists, opposes, prevents, impedes, or interferes with any officer or employee of the Bureau of Animal Industry of the United States Department of Agriculture in the execution of his duties, or on account of the execution of his duties, shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than one month nor more than one year, or by both such fine and imprisonment; *and every person who discharges any deadly weapon at any of-*

ficer or employee of the Bureau of Animal Industry of the United States Department of Agriculture, or uses any dangerous or deadly weapon in resisting him in the execution of his duties, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duties, or on account of the performance of his duties, shall, upon conviction, be imprisoned at hard labor for a term not more than five years or fined not to exceed one thousand dollars." (Italics supplied) 33 Stat. 1265.

In addition to making some immaterial changes in phraseology, the authors of the 1909 Criminal Code, in substance, dropped the italicized words from the original statute, presumably because they were deemed redundant and not with the purpose of altering the original offense. See H. R. No. 304, 80th Cong. 1st Sess., *supra,* at pages 2, 3 (1947).[6] Yet those words clearly disclose the intention of Congress to punish the discharge, or other use, of a dangerous weapon without regard to the consequences. And in each of the few cases reported under the deadly weapon prohibition of the statute, the offense laid was apparently conspiracy to use deadly and dangerous weapons upon employees of the Bureau of Animal Industry. See *Thornton* v. *United States,* 2 F. (2d) 561 (C. A. 5th, 1924), affirmed, 271 U. S. 414 (1926); *Carter et al.* v. *United States,* 38 F. (2d) 227 (C. A. 5th, 1930).

As we have shown, the consolidation of Sections 118 and 254 of former Title 18 to become Section 111 of present

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[6] Referring to the 1909 revision of the Criminal Code, the Committee on the Judiciary stated: "It brought together statutes relating to the same subject, and omitted redundant and obsolete laws. However, no sweeping changes were made then. Actually, the Commission added just 21 new sections, only 10 of which created new offenses."

Title 18 was intended to eliminate "a serious incongruity in punishment and application." *Supra,* p. 18. Had there been any further purpose, it would have surely been mentioned in the section by section explanation of the proposed new Title 18 by the House Committee on the Judiciary in its report cited above. It must be concluded that that Committee considered the offenses under the consolidated sections to be in substance identical. Yet we have shown that one of those statutes, in its original form, explicitly condemned the discharge of a weapon without taking into account the consequences of such discharge. It follows that the other statute, which is here involved, should be similarly construed.

IV

Even if the Interpretation of Section 254 by the Courts Below Were Correct Petitioner Committed Only a Single Violation of That Statute.

For the present argument we accept the assumption of the courts below that Section 254 prohibited assault with a dangerous weapon. More precisely, we assume, as apparently the courts below did, that Section 254 should be read as if the words "(with) a deadly or dangerous weapon" were transposed from the second clause to the first clause and were inserted after the words "shall assault him". Or we could assume, *arguendo,* that petitioner were charged, under the first clause, in two counts with simple assaults on two Federal officers accomplished by a single blow of his fist.

Whether a single blow which had an impact on two Federal officers constituted one or two violations of Section 254 depends on the intention of Congress in enacting

the statute.[7] *Bell* v. *United States, supra,* 349 U. S. 81 (1955). That Congress could have imposed double punishment in such a case is conceded (see *Badders* v. *United States,* 240 U. S. 391 (1916)); the question is whether it has done so. *Bell* v. *United States, supra.*

The issue under the statute involved here is *res nova* in this Court. Furthermore, except for the decision of Judge Mize in an identical case involving petitioner's co-defendant, *United States* v. *Cameron,* 84 F. Supp. 289 (S. D. Miss. S. D., 1949), there is no precedent for the decision below. Nor is there any decision on the point under Section 118 of former Title 18 or Section 111 of the present Title.

The language of the statute is ambiguous, even under the construction adopted by the courts below. Although Section 254 prohibited certain acts affecting "any person designated in section 253", it does not follow that the unit of prosecution is the impact of the wrongful act upon each such person. The use of the words "any woman or girl" in the Mann Act was held by this Court not to indicate a Congressional intent to inflict separate punishment for the illicit transportation of each of two women simultaneously. *Bell* v. *United States, supra. Cf: Dimenza* v. *Johnston, supra,* 130 F. (2d) 465 (C. A. 9th, 1942); *Johnston* v. *Lagomarsino,* 88 F. (2d) 86 (C. A. 9th, 1937).

Decisions under other statutes cannot disclose the intention of Congress in enacting Section 254, but support the claim of petitioner.

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[7] Mr. Justice Story has stated the controlling principle as follows: "In short, it appears to me that the proper course, in all these cases, is, to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *United States* v. *Winn,* 3 Sumn. 209, 211, 212 (C. C. Mass., 1838), quoted in *United States* v. *Lacher,* 134 U. S. 624, 628 (1890).

Conflict in the cases[8] under the Mann Act was resolved by *Bell* v. *United States, supra,* which held that the unit of prosecution was the illicit act of transportation and that the number of women transported in one act of transportation was not material. In its first opinion herein the Court of Appeals seemed to be influenced by the Mann Act cases in its Circuit, which had held the transportation of each woman to be a separate offense (R. 21); but later, when the *Bell* case came to its attention, the Court refused to follow it (R. 21).

Doubtless the Government will distinguish the *Bell* case on the ground that the basis of Federal jurisdiction under the Mann Act is the act of transportation in interstate commerce, whereas in the present case the basis of jurisdiction is interference with a Federal officer in the performance of his duties and such interference is personal as to each officer. But in the *Bell* case the Government argued that the purpose of the Mann Act is to protect each woman and that a separate offense is committed in respect of each woman transported. See 99 L. Ed. 908, 909. In any event the *Bell* decision did not rest on any precise determination of the basis of jurisdiction but on the principle that ambiguity in the penal provisions of a criminal statute "will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes." *Bell* v. *United States, supra,* 349 U. S. at 84. The short answer to any attempt to escape the impact of the *Bell* case is that Section 254, like the Mann

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[8] In accord with the *Bell* case was *Robinson* v. *United States,* 143 F. (2d) 276 (C. A. 10th, 1944). *Contra: Crespo* v. *United States,* 151 F. (2d) 44 (C. A. 1st, 1945), cert. dismissed, 327 U. S. 758 (1946); *St. Clair* v. *Hiatt,* 83 F. Supp. 585 (N. D. Ga., 1949), aff'd 177 F. (2d) 374 (C. A. 5th, 1949), cert. denied, 339 U. S. 967 (1950); *United States* v. *St. Clair,* 62 F. Supp. 795 (W. D. Va., 1945).

Act, does not provide multiple penalties for the multiple consequences of a single act.

The mail bag cases, cited by the Court of Appeals, do not support its decision. In *Ebeling* v. *Morgan,* 237 U. S. 625 (1915), under a statute making it an offense to "tear, cut, or otherwise injure any mail bag * * * with intent to rob or steal any such mail," this Court held that the cutting of each mail bag was a separate violation even though the bags in question were all cut in a single transaction. That case involved a series of acts, whereas in the instant case there was only one act. See *Morgan* v. *Devine,* 237 U. S. 632, 640 (1915). This distinction was made by the Court of Appeals for the Ninth Circuit in *Johnston* v. *Lagomarsino, supra,* 88 F. (2d) 86 (C. A. 9th, 1937), where the simultaneous theft of three parcels from a mail pouch was held to be only one violation of a statute which made it an offense to steal from the mail "any letter, postal card, package", etc. The Court of Appeals stated: "To take several letters from a mail depository simultaneously and continuously is one act and comprehends one intent." 88 F. (2d) at page 88. Nothing could more certainly be a single act than the discharge of a shotgun, achieved by the pressure of a finger on the trigger.

Under the same statute that was involved in the *Lagomarsino* case, the same Court has held that the simultaneous theft of three mail bags is only one offense. *Kerr* v. *Squier,* 151 F. (2d) 308 (C. A. 9th, 1945). The Court rested its decision on the ground that the bags were taken in one transaction, and avoided the Draconian decision in the *Ebeling* case by distinguishing it on the dubious ground that cutting mail bags necessarily involves successive acts whereas they can be stolen simultaneously. See, *contra: Warner* v. *United States,* 168 F. (2d) 765 (C. A. 5th, 1948).

Cases under one phase of the Bank Robbery Act (12 U. S. C. (1946 ed.) § 588 b, currently 18 U. S. C. § 2113)

culminate in the recent decision of this Court in *Prince* v. *United States*, 352 U. S. 322 (1957).[9] There it was held that entering a bank with intent to commit robbery and the consummation of such robbery, which are separately proscribed by the statute, constitute only one offense. Absence of any evidence of Congressional intention to impose multiple punishment, where the unlawful entry is followed by an actual robbery, and some evidence to the contrary in the legislative history of the statute, supplied the grounds for the decision. Those grounds are equally present in the instant case.

The courts of appeals seem to be in agreement that "the offense of bank robbery by the use of deadly weapons as defined in § 588 b (b) [of Title 12, U. S. C. (1946 ed.)] is the same offense described in § 588 b (a) aggravated by the use of a deadly weapon, and that Congress did not intend to define two separate offenses but only one * * *". *Dimenza* v. *Johnston, supra,* 130 F. (2d) 465, 466 (C. A. 9th, 1942); *Vautrot* v. *United States,* 144 F. (2d) 740 (C. A. 8th, 1944); *Hewitt* v. *United States,* 110 F. (2d) 1 (C. A. 8th, 1940), cert. denied, 310 U. S. 641 (1940); *Lockhart* v. *United States, supra,* 136 F. (2d) 122 (C. A. 6th, 1943); *Wells* v. *United States,* 124 F. (2d) 334 (C. A. 5th, 1941); *Durrett* v. *United States,* 107 F. (2d) 438 (C. A. 5th, 1939).

Much more closely related to the present problem are the cases which hold that there is only one violation of former Section 588 b (b) of Title 12, U. S. C. where the lives of more than one person are put in jeopardy by the use of a dangerous weapon in the commission of a bank robbery. *Lockhart* v. *United States, supra; Dimenza* v. *Johnston, supra.* Yet the statute made it an offense to put in jeopardy the life of "any person". Surely these cases support our contention, *supra* at page 11, that the use of a

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[9] Prior conflicting decisions of the courts of appeals are cited in this Court's opinion. 352 U. S. at 324, ft. nt. 3.

deadly or dangerous weapon to resist or impede several Federal officers would be a single violation of Section 254, and that, accordingly, the use of such a weapon to assault two Federal officers would similarly constitute a single offense.

Application of general law in determining the punishments prescribed by Section 254, as construed by the Court of Appeals, is of no avail. For the general law cannot disclose the intention of Congress in enacting Section 254. Moreover, that law is clouded with confusion and conflict.

It has been held that a conviction of assault and battery and wounding a person bars a subsequent indictment of the same defendant for the same offense committed upon another person where both alleged offenses "were at the same place and in the same affray, and the wounds made by the same instrument and by the same stroke." *State* v. *Damon,* 2 Tyler 387, 390 (Vt., 1803). *Cf: Gunter* v. *The State,* 111 Ala. 23 (1895). See *Wharton's Criminal Law* (12 ed. 1932), sec. 34. *Contra: Berry* v. *State,* 195 Miss. 899 (1944). *Cf: Regina* v. *Gray,* 5 Ir. L. Rep. 524 (1843). However, the *Damon* case is said to represent the minority view. See *Horack, The Multiple Consequences of a Single Criminal Act, supra,* 21 Minn. L. Rev. 805 (1937) at page 808. In cases of negligent homicide of more than one person by a single act, the majority of the decisions hold that there is only one offense. *People* v. *Barr,* 259 N. Y. 104 (1932). See *State* v. *Cosgrove,* 103 N. J. L. 412 (1926). See *Horack, op. cit. supra,* 21 Minn. L. Rev. at page 809. *Contra: State* v. *Fredlund,* 200 Minn. 44 (1937); *Lawrence* v. *Commonwealth,* 181 Va. 582 (1943).

The doctrine that a separate criminal offense is committed with respect to each victim of the criminal conduct is supported on the ground that each victim can maintain a civil action for damages against the wrongdoer. See *Wharton—Criminal Pleading & Practice* (9 ed. 1889), at

page 336. But the civil consequences of the act have no bearing upon the question of criminal responsibility. See *State* v. *Damon, supra,* 2 Tyler at page 390. Sometimes the courts, in finding multiple offenses, betray a purpose of inflicting severe punishment because of the number of victims of the single act. See, *e. g., State* v. *Fredlund, supra.*[10] Indeed, it seems fair to say that the courts have followed their own predilections in these cases and have assigned equally convincing reasons for their conflicting conclusions.

We conclude that the rationale of some of the decisions under other Federal statutes tends to support the claim of petitioner and that the cases under state statutes and the common law establish no doctrine that is applicable here.

V

In the Absence of Evidence of a Contrary Intention of Congress Section 254 Should Be Construed Not to Provide for Multiple Punishments.

Whether Section 254 is interpreted to prohibit the use of a dangerous weapon, as we have urged, or to prohibit assault with a dangerous weapon, as the courts below have held, there is no provision in the statute for double punishment for a single act. The legislative history of the statute, and of a related statute, tends to show that Congress did not intend to provide for such punishment. In these circum-

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[10] The Court stated, 200 Minn. at 54:

> "In view of present-day conditions, where murderous gangs by means of high-powered machine guns, sawed-off shotguns, and the like often cause death to our citizens, and where great bodily injury or death to many may be the result of a single discharge of such weapons, it would indeed be a sad condition of affairs were we to give a narrow construction to the state's right to protect its people."

stances the statute should be strictly construed to provide for single punishment for a single criminal act.

Proclamation of the controlling principles has been made in recent decisions of this Court. See *Prince* v. *United States, supra,* 352 U. S. 322 (1957); *Bell* v. *United States, supra,* 349 U. S. 81 (1955); *United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218 (1952). Congress can establish multiple offenses and multiple punishments by explicit words when it has the will to do so. Where statutory provisions for criminal penalties are inexplicit, the doubt will be resolved "against the imposition of a harsher punishment." *Bell* v. *United States, supra,* 349 U. S. at page 83. Multiple offenses entailing multiple punishments will not be found in equivocal expressions of Congressional intent or in the silence of Congress. The principle that a criminal statute will be strictly construed does not stem from sentimental solicitude for transgressors but is derived from the concern of the common law that no man be unjustly accused or punished.

It is upon these basic doctrines that we rest the petitioner's case. They were not applied by the Court of Appeals. That Court misread the statute with respect to the offense that was condemned. Under its view of the statute it followed its own Mann Act decisions upholding multiple offenses in its original opinion. Subsequently learning of the decision of this Court in the *Bell* case, it rejected its authority by a *tour de force* and ignored its implications.

Excessive punishments imposed on the basis of supposed multiple offenses present a grave problem in the administration of the criminal law. The magnitude of the injustices that may be inflicted upon admittedly guilty men is indicated by a glance at a few cases where multiple punishments were rejected.[11]

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[11] See, for example, *Prince* v. *United States, supra,* sentence of 35 years held excessive by 15 years; *Johnston* v. *Lagomarsino,*

Important reforms in respect of multiple offenses, trials and punishments are recommended in the pending proposed Model Penal Code of the American Law Institute. Under that Code, where the same conduct may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense but may not be convicted of more than one offense if one offense consists only of a conspiracy or other form of preparation to commit the other. Section 1.08(1), American Law Institute Model Penal Code, Tentative Draft No. 5. In the present case, the first count of the indictment charged the defendants with conspiracy to commit the offenses alleged in the second and third counts (R. 1). Since the sentences imposed on the first and second counts were concurrent, the multiplication of convictions by virtue of the conspiracy count is not material.

The Model Penal Code does not deal with the problem whether one or more offenses are committed where a single criminal act has multiple consequences, as in the present case, since the problem relates to substantive law and is not within its purview. *Op. cit. supra,* Tentative Draft No. 5, page 38. However, the sentence in this case would be excessive under a provision in the Code that, when separate sentences of imprisonment are imposed for two or more crimes, such sentences shall run concurrently if any of the sentences is for a felony. *Op. cit. supra,* Tentative Draft No. 2, Sec. 7.06. This section and other provisions, which relate to the companion cases to be argued herewith,

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supra, sentence of 20 years reduced to 10 years; *Colson* v. *Johnston,* 35 F. Supp. 317 (N. D. Cal. S. D., 1940), 11 count indictment held to state a single offense of mail robbery, and sentence of 50 years reduced to 25 years; *Hewitt* v. *United States, supra,* sentence of 45 years reduced to 25 years; *Durrett* v. *United States, supra,* sentence of 60 years reduced to 40 years, and under *Prince* v. *United States, supra,* was still excessive by 20 years; *Dimenza* v. *Johnston, supra,* sentence of 22 years reduced to 7 years; and *Kerr* v. *Squier, supra,* sentence of 27 years held excessive by 10 years.

show that the policy of the Code is strongly opposed to multiple trials and multiple punishments in many situations where they are now tolerated.

In cases involving problems of multiple offenses, trials and punishments, this Court and the lower Federal courts have recognized that the true inquiry is the intention of Congress but have, nevertheless, frequently applied the "same evidence" rule in determining whether one or more offenses have been committed. See *Blockburger* v. *United States,* 284 U. S. 299 (1932); *Morgan* v. *Devine, supra,* 237 U. S. 632 (1915); *Burton* v. *United States,* 202 U. S. 344 (1906); *Warner* v. *United States, supra,* 168 F. (2d) 765 (C. A. 5th, 1948). That rule is stated in *Gavieres* v. *United States,* 220 U. S. 338, 342 (1911), quoting the Supreme Judicial Court of Massachusetts in *Morey* v. *Commonwealth,* 108 Mass. 433, 434 (1871):

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other."

One court of appeals has perceived the danger of dissecting a single criminal act or transaction into multiple offenses under the same evidence rule and has held that the rule must be applied "with some discrimination." *Robinson* v. *United States, supra,* 143 F. (2d) at 277. Yet, the test was used by the Court of Appeals in this case, as it has been used by other courts, as a rule of thumb substituting inadequately for a full inquiry into the legislative intent (R. 21). See *Gore* v. *United States,* —— F. (2d) ——, decided April 25, 1957 (C. A. D. C.); *Warner* v. *United States, supra,* 168 F. (2d) 765 (C. A. 5th, 1948); *United States* v. *Cameron, supra,* 84 F. Supp. 289 (S. D. Miss.

S. D., 1949); *State* v. *Fredlund, supra,* 200 Minn. 44 (1937).

The decision in *Bell* v. *United States, supra,* is inconsistent with the "same evidence" rule. Under that rule the transportation of each woman would have been an independent fact supporting a separate offense and punishment. And some circuit judges have found in the *Universal C. I. T.* case, the *Bell* case, and the *Prince* case, all *supra,* reason to believe that this Court has abandoned the rule. *Gore* v. *United States, supra* (concurring opinion of Judges Bazelon and Fahy). Since the same evidence rule "has facilitated the fragmentation of crimes into multiple, separately punishable components," (*ibid.*), it is submitted that the rule should now be repudiated. Such a repudiation would bring a greatly needed reform to the administration of criminal justice. And in place of that rule there should be applied in this case the principle reaffirmed by this Court in *Prince* v. *United States, supra,* 352 U. S. at 329, "of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history."

Conclusion

For the foregoing reasons we respectfully urge that the judgment of the Court of Appeals should be reversed and that the cause be remanded with instructions to grant petitioner a hearing on his motion to correct his sentence.

Respectfully submitted,

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